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IN THE

Supreme Court of the United States

OCTOBER TERM, 2003

GARY LOCKE, *et al.*, *Petitioners*

v.

JOSHUA DAVEY, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF COMMON GOOD LEGAL DEFENSE FUND AND YOUR CATHOLIC VOICE FOUNDATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[*]

Amicus Curiae, the Common Good Legal Defense Fund, is a division and outreach of the Common Good Foundation, a not for profit organization dedicated to the conversion of culture. Common Good serves its mission through four pillars of participation: the dignity of all human life, primacy of the family, authentic human freedom and solidarity with the poor.

Amicus Curiae, Your Catholic Voice Foundation is the educational and evangelical outreach of the Your Catholic Voice movement: a movement of faithful Catholic citizens serving the common good. Your Catholic Voice Foundation is dedicated to the social teaching of the Catholic Church and serves its mission through four pillars of participation: the dignity of all human life, primacy of the family, authentic human freedom and solidarity with the poor.

Both are not-for-profit, non-stock corporations recognized as public charities under Section 501(c)(3) of the Internal Revenue Code. As multi-confessional groups serving the common good among all people of faith and good will, *Amici* seek to bring the murky past of the "Blaine Amendments" to light, so that this honorable Court may find them unconstitutional. These Amendments are an impediment to educational freedom, undermine the role of parents as the first teachers of their children, and violate the cherished constitutional protections afforded all Americans.

SUMMARY OF ARGUMENT

When the first wave of Catholic immigrants came to America, they came in an array of ethnic diversity and cultural variety. They also practiced a different form of Christianity than the majority of the American Christian population. As this Catholic minority grew, the Protestant majority responded with isolationism and nativism. Some sought to

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[*] Pursuant to Rule 37.3(a) of the Rules of this Court, *Amici* have obtained and lodged the written consents of all parties to the submission of this *Amici Curiae* brief. Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person, other than *Amici* and its counsel, made a monetary contribution to the preparation or submission of this brief.

homogenize this growing minority into their idea of a kind of American civil piety. One of the socio-political structures employed was the common (public) school system.

The common schools had developed a predominately Protestant culture which bore seeds of anti-Catholicism and failed to respect the legitimate desires of Catholic parents to keep their children Catholic. Catholics responded by forming their own schools to ensure that their children could live and practice their Catholic Christian faith. This set Catholic schools in competition with the "common school" system.

The Protestant majority reinforced their determination to maintain the "common schools" by denying state aid in any form to institutions they labeled as "sectarian."

Because First Amendment Establishment Clause jurisprudence before the *Everson* decision did not prevent such aid, self-interested politicians sought to create such a burden against Catholics. They proposed so-called "Blaine Amendments" to block any local or state initiatives that might allow such aid.

The discriminatory effects of these Amendments can still be felt today, though many people remain unaware of their tainted past. As in this case, the state denied an educational choice solely on the basis of religion. This denial has far reaching consequences for religious parents who desire to have their values reinforced in the educational experience that takes place outside of the first schoolhouse of the home.

ARGUMENT

I. A PROPER REVIEW OF THIS CASE IS AIDED BY UNDERSTANDING THE SOCIAL HISTORY AT THE TIME THESE AMENDMENTS WERE ENACTED.

A. THE DEMOGRAPHIC FLUX INITIATED BY MASSIVE CATHOLIC IMMIGRATION WAS PERCEIVED AS A THREAT TO PROTESTANT DOMINANCE.

When the Constitution was ratified, the Catholic population was a negligible minority in the United States. At hardly one percent of the national population, they numbered a mere 30,000 at the time of the Revolution.[1] Their numbers grew to 1.6 million by 1850, and that figure doubled in only a decade. After dramatic increases in immigration through 1900, the Catholic population was on its way to reaching twelve million. In comparison, as the Catholic population nearly doubled, the overall population grew by only 59%.[2]

These immigrant groups were mostly poor and lived in the cities. Their marked cultural differences and religious practices, coupled with their exploding population, gave rise to fears in the Protestant majority that their existing civic culture was threatened.[3]

B. THE DISTRUST BETWEEN PROTESTANT AND CATHOLIC GROUPS SURFACED IN THE STRUGGLE FOR INFLUENCE IN THE EDUCATIONAL SYSTEM.

Concurrent with a rising anti-Catholic sentiment was the formation and growth of the common school system. The founders of the common school movement were closely connected to the Protestant majority. Led by men such as Horace Mann, the early common schools used Bible reading, prayer and hymns in their curriculum. At that time, education stripped of all religious content was "simply inconceivable."[4]

While there was little doubt that religion was integral to properly educating children, the only common denominator upon which the mainline Protestant denominations could agree was the reading of Scripture. The teachers used the King James Version of the Bible, a translation not favored by the Catholic Church. They also had children read the Scriptures without proper instruction. This was contrary to Catholic

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[1] John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 299 (2001).
[2] Toby J. Heytens, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 135 (2000).
[3] Jeffries, *supra* note 1, at 303-304.
[4] *Id.* at 297-299.

teaching and concerned parents given the systemic hostility toward Catholicism present in many of the Protestant groups.[5]

The Protestant majority also agreed that public monies should be withheld from competing "sectarian" (a code term for Catholic) schools, a move to maintain cultural homogeneity and political hegemony.[6] Particularly virulent in this regard were anti-Catholic groups like the Know Nothings and the Ku Klux Klan. However, even those who considered themselves high-minded viewed the Catholic Church as antithetical to the democratic principles that formed the basis of American society.[7] Included in their prejudice was a profound distrust of the patriotism of Catholics based on their commitment to the central authority of the Church hierarchy.[8] Although these fears were entirely groundless and reflected bigotry, ignorance, and inherited suspicions, they were influential.

There was also a lingering stigma attached to the Catholic Church's connections with some monarchies in the Old World and a presumed Catholic indifference to freedom of individual religious conscience.[9] Even as late as the 1950s, Protestants believed that Catholics' ideal Church/State relationship would lead to interdependence reminiscent of the Middle Ages. They feared that this influence would eventually threaten Protestants and other religious faiths.[10] However, it is clear that these fears were wildly disproportionate.[11]

Even so, anti-Catholics within the majority Protestant community perceived that Catholics wanted to usurp their way of life. There was also a growing secular nationalism, which competed with all religions for the

[5] *Id.* at 300.
[6] *Id.* at 282; *see also* Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 Loy. U. Chi. L.J. 121,130 (2001) (noting the intensity of Protestant opposition and the use of the phrase "separation of church and State" serving as code for the unspoken but understood prejudice against the Catholic Church); Richard A. Baer, Jr., *The Supreme Court's Discriminatory Use of the Term "Sectarian"*, 6 J.L. & Pol. 449 (1990) (noting that the Free School Society, founded in New York City in 1805, actively lobbied for a monopoly over the entirety of education tax revenues by referring to Catholic and Baptist schools as "sectarian" and their own schools as "nonsectarian").
[7] Jeffries, *supra* note 1, at 302.
[8] *Id.*
[9] *Id.*
[10] Berg, *supra* note 6, at 133.
[11] *Id.* at 138-140.

hearts of their faithful. Eventually, this led to later educational leaders such as John Dewey advocating instruction of democratic ideals as its own kind of "progressive democratic religion."[12]

C. COMPETING PERSPECTIVES FOUGHT FOR THEIR SHARE OF REPRESENTATION IN THE EDUCATION OF THE NATION'S YOUTH.

The intellectual leadership of the common school movement sought to consolidate their power by advancing a notion of the State as more important than parents in the civic instruction of children. An 1851 article in an education periodical, *The Massachusetts Teacher*, described how immigrant children "must be taught as our own children are taught. We say must be, because in many cases this can only be accomplished by coercion… The children must be gathered up and forced into school, and those who resist or impede this plan, whether parents or priests, must be held accountable and punished."[13]

Similarly, by 1865, the Wisconsin Teachers' Association believed that "children are the property of the state," and a year later the forerunner to today's NEA, the National Teachers' Association, published their policy that "the duties which a citizen owes to the government are prior to any personal or individual claims."[14] The common schools, now the public school system, jealously guarded their educational monopoly to indoctrinate the nation's children. They put their ideology over other crucial social influences, such as the role of parents as first teachers, and the primacy of the family as the first school, first church, first government, first mediating institution and first vital cell of society. Out of this trajectory has grown a hostile form of secularism, which birthed the modern anomaly of interpreting the Establishment Clause (once rightly understood as an *Anti*-establishment Clause) as if in some kind of struggle with the First Amendment's guarantee to individual freedom of conscience embodied in the Free Exercise and Free Speech Clauses.

[12] Jeffries, *supra* note 1, at note 155.
[13] Marvin Olasky, *Breaking Through Blaine's Roadblock*, World, Aug. 24, 2002, *at* http://worldmag.com/world/issue/08-24-02/cover_1.asp.
[14] *Id.*

The Catholic minority did not passively accept the bigotry of this majority approach. Instead they acted upon their deep concerns for their human and civil rights through both political demonstrations and participation at the local level. The Protestant majority turned a deaf ear to this Catholic action. They felt that if Catholics wanted an alternative to the Protestant-run public schools, they would have to find a way to fund their own schools.

Protestants sought to defend the monopoly of the common school system at any cost. Because Catholics were the only group at that time with any number of religiously-affiliated schools, their Protestant and secular opponents viewed any aid to parochial schools as special treatment—amounting to some form of a government subsidy to Catholics and their suspect Church. Ironically, they never considered the future possibility of other, competing schools of religious or secular orientation in the America they knew. They thereby, knowingly or unknowingly, perpetuated anti-Catholic prejudice.[15] These groups also laid the foundation for the obstructions presented by the current efforts to use discriminatory laws against any aid to any religiously affiliated schools, including Protestant schools.

D. CATHOLIC SUCCESSES CREATED CONCERN AMONG THE PROTESTANT MAJORITY THAT MOTIVATED REACTIONS AT HIGHER GOVERNMENTAL LEVELS.

In major cities with large Catholic populations, there was some early success in attempts to garner state support of church schools, such as in New York and Wisconsin, among others.[16] The Protestant majority reacted by relying on their greater number to nullify local Catholic victories. For example, in 1894, after a local effort by Catholics succeeded in New York City, a state constitutional amendment banned all public money from going to church-affiliated schools.[17] Finally, some politicians began to see an opportunity for a constitutional amendment that would take

[15] Berg, *supra* note 6, at 144 (noting that "the separationist view of parochial aid as a 'special privilege,' and public schools as the neutral baseline, retained more that a little of the fear that a divided Protestantism would be overwhelmed by a unified and aggressive Rome").
[16] Heytens, *supra* note 2, at 137.
[17] Jeffries, *supra* note 1, at 301.

this tug-of-war to its ultimate termination, and gain renown for themselves in the process.

II. ATTEMPTED PASSAGE OF THE BLAINE AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. JAMES BLAINE CAPITALIZED ON A NATIONAL TREND OF BIGOTRY FOR HIS OWN POLITICAL PURPOSES.

The scholarly consensus is that from the historical context outlined above came the series of legislative enactments known as the "Blaine Amendments."[18] This body of legislation derives its name from James Blaine (1830-1893), a shrewd and ambitious politician who served in various political positions, and ultimately became Speaker of the U.S. House of Representatives, where he remained from 1869 to 1875.[19]

Blaine left a very questionable legacy. Posterity views him much less warmly than did his contemporaries. At his death in 1893, Chauncey Depew declared "his name will rank with Lincoln's," but only 40 years later, his biographer Charles Russell concluded, "No man in our annals has filled so large a space and left it so empty."[20] His family background complicated his political hopes. His father came from a loosely Presbyterian background and his mother from a Catholic one; however, they raised him as a secularist.[21] Fearing the potential for his opponents to question his familial ties to Catholicism, Blaine sought to find a way to distance himself from the Catholic Church and capitalize on the endemic anti-Catholic surge in national politics for his own gain.

He found his chance in the Republican Party of the time, a sickly organization after plagues of corruption and regional fragmentation had eroded its base of support. Because they held mostly narrow and reactionary views, the party was losing power and sought a new agenda

[18] *See* Heytens, *supra* note 2, at 138.
[19] *See for a brief career biography* http://www.blaineamendments.org/Intro/JGB.html.
[20] Olasky, *supra* note 13.
[21] *Id.*

around which to rally support.[22] The issue they settled upon was the Catholic "threat." They continued to alienate Catholics and Southerners, (who were already mostly Democrats), in order to gain the support of Northern Protestants and activate them to vote on a single issue. The Republican President at the time, Ulysses S. Grant, harbored strong anti-Catholic beliefs that were furthered by his poor familiarity with Scripture and his ignorance of Church history. He once publicly proclaimed that Catholicism was connected with "superstition, ambition, and ignorance."[23]

In the midst of this vacuum and turmoil, James Blaine saw his opportunity for prominence. He came to believe that he had potential as a Presidential candidate on the Republican ticket and did indeed become his party's nominee in 1884, but his candidacy was unsuccessful. During his campaign, a member of his staff referred to the Democratic Party as the party of "Rum, Romanism, and Rebellion," a statement Blaine refused to deny.[24]

Blaine was an aggressive force in Congress as House Speaker and exerted that force effectively. Even so, some of his peers chafed at his often-overbearing control.[25] In order to ascend to prominence, he had to find a cause to launch him into the popular political stage of the day. He did this by using his strong presence as House Speaker to propose a new Amendment to the United States Constitution that would deny any form of aid to all "sectarian" schools.[26]

B. THE BLAINE AMENDMENT USED A TREND OF BIGOTED POLITICAL SUBTEXT TO CREATE A PRECEDENT OF DISCRIMINATORY LANGUAGE

[22] *Id. Cf.* Heytens, *supra* note 2, at 132.
[23] Olasky, *supra* note 13.
[24] *Id.*
[25] Heytens, *supra* note 2, at note 78 (In a 1876 debate, another Congressman exclaimed, "I want to know whether this is the American Congress, or a school in which we are merely pupils of the school-master from Maine!").
[26] *Id.* at 132. The text of the Amendment read:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor nor any public lands devoted thereto, shall ever be under the control of any religions sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

THAT HAS PLAGUED OUR COUNTRY TO THE PRESENT DAY.

The use of the term "sectarian" within the context of Blaine's Constitutional Amendment was no coincidence, as it was a well-understood code word for "Catholic" within the socio-political language of the time.[27] Over the next century, this code word continued to be used in political parlance. Though used by the United States Supreme Court in its opinions since *Everson*, by then the term was expanded to include any group with unpopular beliefs that the mainstream majority wished to sideline.[28] By the 1930s, secularists had consigned to an outcast status a growing number of devout Christians—Protestant, Orthodox, and Catholic. One extreme example of this is evidenced by statements from personalities such as Paul Blanshard and other signatories of the Secularist "Humanist Manifesto".[29] Even the catchphrase "separation of church and state" was a code term, often used early on in anti-Catholic diatribes before its resurgence in the 1940s in the move toward the current confused Church/State jurisprudence.[30]

C. THE FAILURE OF THE BLAINE AMENDMENT AT THE NATIONAL LEVEL ILLUSTRATED ITS DIVISIVE AND INVIDIOUS PURPOSE.

The events surrounding the history of this Amendment demonstrate that its roots were sunk deep in both a politically motivated opportunism and a discriminatory animus. There was no debate on the substantive merits of the proposed Amendment before it passed the House

[27] *See supra* note 5.
[28] Baer, *supra* note 6, at 451 (explaining "Just as ruling elites have used racial and sexual epithets to put down blacks and women, so they have used 'sectarian' to exclude and marginalize those individuals and groups whose religious or philosophical beliefs or social practices did not correspond to their own vision of what was appropriate in the cultural marketplace").
[29] Jeffries, *supra* note 1, at note 155. ("We have an obligation to expose and attack the world of religious miracles, magic, Bible-worship, salvationism, heaven, hell, and all the mythical deities. We should [specifically attack] such quack millenialists as Bill Graham and such embattled reactionaries as [the pope] because they represent the two greatest humanist aggregates in our society.")
[30] Berg, *supra* note 6, at 130.

by a 180-7 majority, and 98 Congressmen abstained from the vote when it was taken.[31]

After referral to the Senate Judiciary Committee, which added a clause ensuring that the Bible would still be read in public schools, the Senate debated the Amendment in light of their concerns over federalism.[32] Many members were skeptical of the Amendment's overreaching federal interference at the state and local level. The final Senate tally was 28 in favor, 16 opposed, and 27 in abstention. The vote fell along party lines, with all but one Republican favoring its passage, and the entirety of the Democratic members opposed to it.[33] It fell four votes short of the required supermajority necessary for a Constitutional amendment.

The fledgling political magazine, *The Nation*, supported the Amendment's passage, but foresaw its failure and lamented Blaine's indifference: "All that Mr. Blaine means to do or can do with his amendment is, not to pass it but to use it in the campaign to catch anti-Catholic votes."[34] Senator William Wallace Eaton remarked on its politically motivated purpose, that "It was one of [Blaine's] dodges to get a nomination."[35]

However, Blaine himself saw the Amendment as a necessity to correct a "constitutional defect." He published an open letter in the *New York Times* in which he argued that it was required because the Establishment Clause of the First Amendment existed solely to preclude the United States Congress from establishing a particular state church, and that without the Amendment the states were "left free to do as they pleased."[36] This option was inconceivable to him.

With the failure of the federal Blaine Amendment, the anti-Catholic faction in Congress sought other methods to suit their divisive

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[31] Heytens, *supra* note 2, at 132-33.
[32] *Id.* at 133. The Judiciary Committee's added clause was "This article shall not be construed to prohibit the reading of the Bible in any school…"
[33] *Id* at 133-34.
[34] Olasky, *supra* note 13.
[35] *Id.*
[36] Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 Yale L. & Pol'y Rev. 113, 145 (1996).

political ends. They took advantage of their simple majority in both houses of Congress to achieve the failed Amendment's purpose. By 1890, due largely to their efforts, twenty-nine out of forty-five states in the Union placed prohibitions in their state constitutions against the use of public funds to aid "sectarian" schools. Many of these, such as Washington, were new states whose admission to the Union was predicated on their acceptance of such a Blaine Amendment.[37] Congress in 1899 passed an enabling act that divided the Dakotas, North and South, and allowed Washington, Montana, and the Dakotas to become states and form constitutions—but only if they accepted language into their state constitutions almost identical to the failed Federal Blaine Amendment.[38] The citizens in these states were denied the choice given to other states that had democratically passed Blaine provisions or those that have subsequently reinforced them by statute.

Because of the diverse nature and circumstances of the Blaine Amendments' enactments, there is a difference in severity of enforcement and a great inconsistency of interpretation. By forcing these Blaine Amendments on some states, anti-Catholic factions disenfranchised and discriminated against a growing minority that were perceived as a threat to an existing political hegemony. The lasting discriminatory effects of such Blaine Amendments are still felt today by students such as Mr. Davey.

III. DISCRIMINATION BY STATE BLAINE AMENDMENTS ACCOMPLISHES THE BIGOTRY OF THE FAILED NATIONAL BLAINE AMENDMENT.

In particular cases like Washington, state courts have used Blaine Amendments to impose more stringent restrictions on aid to religious schools than has the United States Supreme Court. This Court's decisions since *Everson* have allowed aid to be distributed on a religiously neutral basis notwithstanding its discomfort with any direct public assistance to such schools.[39] Despite great similarities in the language of Blaine Amendments between states (most were worded after the failed Constitutional Amendment), there is great disparity in their application from state to state. As evidenced by the Washington Higher Education

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[37] Jeffries, *supra* note 1, at 305.
[38] Viteritti, *supra* note 36, at 146.
[39] *Id.* at 149-50. *See also* Witters v. State Commission for the Blind, 771 P.2d 1119 (1989).

Coordinating Board's administration of the Promise Scholarship, there is an often arbitrary and uneven application within the same state. In so doing they have violated the constitutionally protected rights to the Free Exercise of Religion by substituting their own standards. This approach does not pass constitutional muster and raises serious Supremacy Clause conflict issues.[40]

A. WASHINGTON'S DISCRIMINATORY PRACTICE REFLECTS THE UNCONSTITUTIONALITY AND GENERAL OFFENSIVE NATURE OF BLAINE AMENDMENTS.

Washington's case law reveals a sorry history of religious discrimination beyond even the broader national trend discussed so far. In 1943, Washington's legislature enacted a provision for universal transportation of schoolchildren that was struck down on Establishment Clause grounds. Two years after the 1947 *Everson* decision, in which this Court upheld such a program, a Washington court once again struck down a public busing program for children who attended parochial schools.[41] The Washington State Supreme Court's decision there was at odds with this Court's precedent, and took issue with the entire line of reasoning on the neutrality of such indirect aid.

Later, in *Weiss v. Bruno*[42] and *Witters v. State Commission for the Blind*,[43] the Washington Supreme Court saw no line of distinction between direct and indirect aid, and what is worse, refused to consider any infringement upon the Free Exercise interest in these cases.[44] The Petitioner in the instant case refers liberally to the *Witters* decision without mention of its obstinate refusal to accept the reasoning of the United States Supreme Court. Indirect aid to a citizen should not be denied simply on the basis of that citizen's religion or course of study.

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[40] Viteritti, *supra* note 36, at 160. "Diversity is expected under our system of judicial federalism. It is problematic, however, when State courts impose limitations on the free exercise of religion that transgress constitutional guidelines set down by the Court. Our system of federalism permits States to define State rights more broadly than analogous federal rights but not to abridge those liberties that are protected by the Constitution."
[41] *Id.* at 152-53.
[42] 509 P. 973 (Wash. 1973).
[43] 771 P.2d 1119 (Wash. 1989).
[44] Viteritti, *supra* note 36, at 153.

In *Garnett v. Renton Sch. Dist. No. 403*, the Ninth Circuit's federal authority prevailed over Washington's discriminatory interpretation of Establishment doctrine.[45] The court declared "Many States have establishment clauses that are more restrictive than the federal establishment clause," but even so, "State constitutions can be more protective of individual rights than the federal Constitution…however, states cannot abridge rights granted by federal law."[46] The instant case epitomizes the abuse that proceeds from such abridgement.

In denying Mr. Davey access to state aid, the State relies upon the Washington State Constitution's establishment clause (Blaine Amendment). However, this very denial violates the Free Exercise and Equal Protection clauses of the United States Constitution. Furthermore, it violates his basic human rights which, in the words of the Founders, are "inalienable."

IV. THE DISCRIMINATION ENDEMIC IN THE BLAINE AMENDMENTS VIOLATES THE UNITED STATES CONSTITUTION'S GUARANTEES OF INDIVIDUAL FREEDOM.

Petitioners have failed to show that their Blaine Amendment survives strict scrutiny by protecting a compelling state interest. It is certainly not narrowly tailored. As one scholar has pointed out, the very difference between Blaine Amendments and the Establishment Clause in the First Amendment is their divergently overbroad standard of what constitutes establishment, and for that reason, "the Blaine Amendments are, by definition, overinclusive because they go further than is necessary to comply with the Establishment Clause's self-executing dictates."[47] State courts have shown their lack of willingness to strictly construe this anachronistic law, favoring instead to engage in an arbitrary and unequal enforcement. Washington's Blaine Amendment should be struck down as unconstitutional. It is overly broad in its application, tramples free exercise, free speech and free association, and continues a sordid legacy of discrimination and bigotry when so much of this sad segment of the past has been rightly purged from American society.

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[45] 987 F.2d 641 (9th Cir. 1993).
[46] *Id.* at 646.
[47] Heytens, *supra* note 2, at 150-51.

A. IN ITS OVERZEALOUS PROTECTION OF A POORLY DEFINED STATE INTEREST, THE BLAINE AMENDMENT VIOLATES FREE EXERCISE.

The two clauses of the First Amendment pertaining to religion exist in a balance of interests. Sometimes this balance is oversimplified or skewed so as to favor one interest at the expense and detriment of the other. When any such conflict looms, the individual liberty interest protected by the Free Exercise Clause should govern over the more ethereal threats to Establishment Clause state interests.[48] Professor Laurence Tribe explained the relationship:

> Whenever both religion clauses are potentially relevant...the dominance of the free exercise clause follows from the principles underlying both clauses....In the context of these general values, we must consider whether a nation committed to religious pluralism must, in the age of the affirmative state, make active provision for maximum diversity; we must ask whether, in the present age, religious tolerance must cease to be simply a negative principle and must become a positive commitment that encourages the flourishing of conscience...it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers.[49]

In the instant case, Washington's discretionary prerogative to extend their state establishment clause well beyond the scope of the First Amendment grossly interferes with the federally-protected Free Exercise Clause and should be stricken as discriminatory and unconstitutional.

B. THE BLAINE AMENDMENTS VIOLATE THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE BY SELECTIVELY DENYING CITIZENS' EQUAL ACCESS TO GOVERNMENT PROTECTION AND PROGRAMS BASED ON A SUSPECT CLASSIFICATION.

With regard to the Equal Protection Clause of the Federal Constitution, Washington's discriminatory Blaine Amendment and its statutory progeny (in addition to other states with similarly discriminatory Blaine Amendments) are subject to strict scrutiny because they discriminate based upon religious distinctions.[50] The Blaine Amendment discrimination is two-fold.[51] Their initial discriminatory purpose was a product of anti-Catholic animus. Also, most of the Blaine Amendments use patent distinctions based on religion, making them facially discriminatory in their classifications. Whether or not a private school is allowed state aid is determined by which religious affiliation, if any, it possesses.

1. BLAINE AMENDMENTS WERE ORIGINALLY DISCRIMINATORY IN THEIR PURPOSE, AND THAT LEGACY CONTINUES IN THE PRESENT CASE.

In *Hunter v. Underwood*,[52] this Court struck down a law that denied voting access to any person convicted of crimes of moral turpitude. Its original enactment discriminated *de facto* based upon race, another suspect classification, even though it could conceivably serve a state interest if currently enacted as written.[53] By the same reasoning, a review of Blaine Amendments should not overlook the original blemish of discrimination that spawned their initial passage, nor spare condemnation simply because of the passage of a century. The original purpose, as well as the enduring legacy of the Blaine Amendments, is discrimination based on the suspect classification of religion that also infringes upon the individual guarantee of free exercise of personal conscience, all in the name of suppressing a religious minority.

2. THE BLAINE AMENDMENTS ARE FACIALLY DISCRIMINATORY BECAUSE THEY DIFFERENTIATE AND EXCLUDE ON THE BASIS OF RELIGION.

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[48] Joseph P. Viteritti, *supra* note 36, at 142 (pointing out, "Like the remainder of the Bill of Rights, this jurisprudence is concerned with the primacy of the individual...For the Court to reverse this priority is like the hen who protects the nest but loses the egg.")
[49] *Id.* (quoting Laurence H. Tribe, *American Constitutional Law*, 1204 (2d ed. 1988)).
[50] Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993).
[51] Viteritti, *supra* note 36, at 145-46.
[52] 471 U.S. 222 (1985).
[53] Heytens, *supra* note 2, at 147 (noting that "Passage of time, standing alone, is insufficient to purge the taint of an originally invidious purpose").

The pertinent articles that stain the Washington Constitution with anti-Catholic and, more generally now, anti-religious bigotry, are Article I, Section 11 and Article IX, Section 4. Art. I, § 11 declares, in part, "No public money or property shall be appropriated for or applied to any *religious* worship, exercise *or instruction*, or the support of any religious establishment."[54] Art. IX, § 4 goes further, "All schools maintained or supported wholly or in part by the public funds shall be forever free from *sectarian* control or influence."[55]

The provision in Article I is arguably more neutral; however, as this Court held in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,[56] "Facial neutrality is not determinative...The Free Exercise Clause protects against governmental hostility which is masked as well as overt." Though the wording of art. I § 11 appears neutral, its interpretation by courts has been overbroad and arbitrary. As noted above, state courts and administrations such as the HECB have failed to notice or recognize any distinction between direct state aid to a religious institution, and an indirect scholarship awarded to a student who selects an accredited college program with a religious affiliation. It is unfair for Petitioners to confuse career training at an institution of higher learning with Sunday school. As a result of this unfair application, Washington has denied a needy student access to state aid and services based on his choice of education and vocational calling.

The very use of the word "sectarian" in art. IX, § 4 should raise an alarm. It is a remnant of discriminatory language used to suppress minorities over the last century. As such, it is facially discriminatory. It excludes participation solely on the grounds of religious conviction and deeply held religious belief. It is subject to strict scrutiny, for as this Court has held, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral...and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest."[57]

[54] *Emphasis added.*
[55] *Emphasis added.*
[56] 508 U.S. 520, 534 (1993).
[57] *Id.* at 533.

The results of variant applications of such amendments show these discriminatory effects even more than a cursory reading of the amendments' language.[58] RCW 28B.10.814 (entitled "Theology student denied aid") details, "No aid shall be awarded to any student who is pursuing a degree in theology." It is curious that Washington lawmakers see no irony in the fact that this statute immediately follows RCW 28B.10.812, which states, "All student financial aid shall be granted by the commission without regard to the applicant's race, creed, color, *religion*, sex, or ancestry."[59] By excluding Mr. Davey from state funds, to which he would otherwise be fully eligible, on the mere basis of his desired major in Theology, the State is unfairly denying him the guarantees of the Equal Protection Clause.

3. UNDER *ROMER V. EVANS*, THE METHODOLOGY OF THE BLAINE AMENDMENTS' ENACTMENT VIOLATES THE EQUAL PROTECTION RIGHTS OF A CLASS OF CITIZENS.

This Court recently struck down a state constitutional amendment under a rationale fully applicable to the Blaine Amendments. In *Romer v. Evans*, the majority of citizens in Colorado had approved a statewide provision that this Court held would have curtailed the local efforts of a minority group, denying them equal protection under the law.[60] For these interested minorities to regain their access to government protection and services, this Court observed, they would have to change Colorado's Constitution, an essentially unlikely prospect considering their overall numerical minority. *A fortiori*, Blaine Amendments, which have had a discriminatory effect upon those claiming access to equal educational opportunities based upon religion, and which are explicit in their discriminatory classifications, violate the Constitution.

CONCLUSION

People of faith in America are now experiencing the consequences of the injustice and errors of past discrimination. Many of the old prejudices are now rightly displaced. However, issues such as the right of

[58] *Id.* at 535 (noting "Apart from the text, the effect of a law in its real operation is strong evidence of its object").
[59] *Emphasis added.*
[60] 517 U.S. 620, 626-27 (1996).

parents to choose where to send their children to school or what majors to study reach far beyond the climate of hostility toward one religious group that fostered the Blaine Amendments. Ironically, some religious people whose very ancestors may have supported such efforts are now themselves the subject of their discriminatory impact. The public schools are certainly no longer reflective of even mainline Protestantism. Private schools, religious schools, and charter schools now boast a diverse selection of choices that reach across economic, cultural, religious, and racial strata.[61]

The discriminatory shadow cast by these Amendments now affects Catholics, Orthodox Jews, Evangelical Protestants, Muslims, and others that form the religious tapestry that is the American experience.[62] Indeed, some of the most salient voices on this issue are African-Americans, who increasingly favor Parental Choice initiatives in education and recognize this as an emerging issue of social justice.[63] Parents of every race, creed and color seek to extend their educational mission as the first teachers of their children through choice from among a wide array of schooling options.

The majority of citizens support the accommodation and tolerance of religion, recognizing that religious persons and institutions play a vital role in society and promote the common good.[64] As Professor John Jeffries Jr. has written concerning the Blaine amendments, "the right response is not refinement but repudiation."[65] The time has come to put Blaine—and a century of discrimination—wholly behind us once and for all. The treatment of Mr. Davey is repugnant to the legacy of authentic freedom protected by the Constitution of the United States of America.

[61] Jeffries, *supra* note 1, at 366.
[62] *Id.* at 359.
[63] *Id.* at 361.
[64] *Id.* at 365.
[65] *Id.* at 370.

Respectfully submitted,

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